PENGIRAN JOHNATHAN MUSA A

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING B
RHODZARIAH BUJANG JC
[CRIMINAL APPEAL NO: 42-20-2009-II]
9 OCTOBER 2009

CRIMINAL LAW: *Penal Code - Section 372A(1) - Living on earnings of prostitute - Appeal against conviction and sentence - Presumption under s. 372A(2), whether invoked and/or rebutted - Uncertainty - Conflicting evidence of witnesses, whether judicially appreciated - Reasons for believing one witness and disbelieving another not stated in judgment - Failure to refer to material evidence in judgment - Whether there was misdirection by trial judge* C D

CRIMINAL LAW: *Penal Code - Section 373(1)(a) - Assisting in management of brothel - Appeal against conviction and sentence - Conflicting evidence of witnesses, whether judicially appreciated - Reasons for believing one witness and disbelieving another not stated in judgment - Failure to refer to material evidence in judgment - Whether there was misdirection by trial judge* E

EVIDENCE: *Judge - Judgment - Failure to consider all evidence - Conflicting evidence of witnesses, whether judicially appreciated - Reasons for believing one witness and disbelieving another not stated in judgment - Failure to refer to material evidence in judgment - Whether there was misdirection by trial judge* F

EVIDENCE: *Witness - Credibility of - Witness lying on collateral matter - Whether entire evidence must be viewed with caution - Whether trial judge must give reasons why witness still considered truthful on a particular matter - Whether failure to provide reasons in judgment amounted to misdirection* G

This was the appellan's/accused's appeal from the decision of the Sessions Court convicting him under both ss. 372A(1) and 373(1)(a) Penal Code and sentencing him to five years' imprisonment with two stokes of whipping on the first charge and two years' imprisonment on the second. The public prosecutor cross-appealed against the concurrent sentences imposed, contending that they were inadequate. H I

A On the first charge the accused was convicted for living on the earnings of the prostitution of five Indonesian women whilst on the second charge he was convicted for assisting in the running of a brothel. Before the High Court herein, the decision of the sessions judge was attacked on the ground that it made no reference to the B presumption in s. 372A(2) Penal Code - thereby raising a doubt as to whether it was invoked against the accused and, if so, whether it had been rebutted. The accused also contended that there was no direct evidence that he had pocketed the moneys paid by the customers for the women's services.

C **Held (allowing the accused's appeal):**

(1) The sessions judge's failure to consider and/or to refer to the presumption under s. 372A(2) Penal Code in her judgment was fatal. (para 18)

D

(2) The sessions judge's failure to consider the testimony of one of the five women ('PW5') - which evidence was exculpatory of the accused - was serious and went to the crux of the prosecution's case. There was no mention in her decision as to why she preferred the evidence of the other four women to that E of PW5. Indeed, evidence must be weighed and not counted. The omissions of the sessions judge here amounted to a misdirection which was fatal to both the charges against the accused. (paras 21 & 22)

F **(3)** The evidence tendered showed that one of the women ('PW1') had lied about her previous entries into Sarawak. Indeed, when a witness has been shown, demonstrably, to have told a lie, her whole evidence must necessarily be viewed with caution. In accepting PW1's evidence, the sessions judge must give reasons as to why, despite having lied on oath, she could still be G considered a witness of truth on the other matters stated by her in her evidence. The sessions judge gave no reasons as to why she preferred PW1's testimony which contradicted the accused's evidence that he had lawfully sublet the premises in question to PW1. This was a non-direction amounting to a misdirection. H (para 22)

[Appeal allowed; convictions quashed and sentences set aside; Public Prosecutor's cross-appeal dismissed.]

I

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Lai Hock Soon & Anor v. PP [1998] 1 LNS 57 HC ***(refd)***
Mohd Johi Said & Anor v. PP [2005] 1 CLJ 389 CA ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 1 LNS 151 FC ***(refd)***
Yuill v. Yuill [1945] 1 All ER 183 ***(refd)***

Legislation referred to:
Penal Code, ss. 372(2), 372A(1), 373(1)(a)
Women & Girls Protection Act 1973, s. 19

For the pp - Musli Ab Hamid; DPP
For the appellant - Jubilant Austinway; M/s AriffinShahzad Advocates

Reported by Gan Peng Chiang

JUDGMENT

Rhodzariah Bujang JC:

[1] The appellant was charged in the Sessions Court with two offences relating to the prostitution of five Indonesian women. The 1st charge was for an offence of living on the earnings of a prostitute under s. 372A(1) of the Penal Code. The 2nd charge was for assisting in a brothel which is an offence under s. 373(1)(a) of the Penal Code.

[2] The appellant was convicted after a full trial and sentenced to five years imprisonment and two strokes of the rotan for the 1st charge and two years imprisonment for the 2nd charge. The imprisonment sentences were ordered to run concurrently by the learned Sessions Court judge. Being dissatisfied with the convictions and sentences imposed, the appellant has appealed against the same and the learned deputy public prosecutor has filed a cross appeal on the sentence.

The Prosecution's Case

[3] The five Indonesian women gave evidence. Their common evidence is that they were plying their trade at the place stated in the charge.

[4] Four of these women, (PW1 - PW4) positively identified the appellant as the man who had taken charge of them in that he provided them with food and supplied them the tools of their trade such as condoms and lubricating gel, in addition to collecting money from their customers after they have given their services.

PW5 however did not make the same accusation against the appellant though she admitted that she was working as a prostitute in the said apartment.

[5] The police raided the apartment on 12 August 2008 and found the appellant as well as the five women and another man there. The tools of the trade which I mentioned above were seized. Also seized were the 'house rules' in which various penalties for contravention of these rules relating to general conduct and prostitution were listed (see exh. P1(a) - (c) at pp. 371 - 374 of the Appeal Record).

[6] The learned Sessions Court judge was satisfied based on these evidence which I have liberally summarized that a *prima facie* case has been made out against the appellant and called him to give his defence.

The Appellant's Defence

[7] The appellant's defence was that he had rented the premises from a Mr. Tan and had sublet it to PW1 (one of the prostitutes). He had the tenancy agreement produced as exh. D1 (see pp. 384 - 385 of the Appeal Record).

[8] His explanation for being at the premises at the time of the raid was because he had to repair a leaky pipe and replace faulty bulbs. The appellant called a witness (DW2), his own best friend, who testified that he witnessed the signing of the tenancy agreement.

[9] The learned Sessions Court judge disbelieved the defence - she referred to the denial by PW1 of renting the place from the accused and seriously doubted the credibility of DW2 as a witness whom she remarked smiled when asked by the defence counsel if he was lying to the court. She also pointed out that the tenancy agreement does not even have a date and DW2 did not know about the date it was signed.

The Petition Of Appeal

[10] The first ground of appeal is that the ingredients of the 1st charge have not been satisfactorily proved and the ingredients of the 2nd charge have not been proven at all.

[11] In respect of the 1st charge, the appellant's counsel's submission is that s. 372A requires proof that the appellant knowingly lives wholly or in part on the earnings of the five women.

Section 372A(2) provides a presumption on knowingly living on the earnings of prostitution once it is proved that a person has exercised control, direction or influence over the works of a prostitute in such a manner as to show that the said person is aiding, abetting or compelling the prostitution of the prostitute.

[12] Learned counsel for the appellant, Mr. Jubilant Austinway, pointed out the failure of the learned Sessions Court judge to address her mind to the presumption; whether the presumption was invoked and if so whether it was rebutted because she did not even refer to it in her judgment.

[13] The complaint made is indeed true. From her judgment, the learned Sessions Court judge relied solely on the evidence of PW1 to PW4 who testified that the appellant was the man who brought customers to the apartment for them to serve, who collected the payments from such services and who provided them with the towels, tissues and condoms to be used when plying their trade (see p. 364 para. 21 of the Appeal Record).

[14] Mr. Jubilant said there is no evidence that the accused pocketed or kept the monies collected from the customers himself because PW1, PW2, PW3 and PW4 all testified that they have their own 'tauke' going by the names of Allan and Ah Seng. He cited the case of *Lai Hock Soon & Anor v. PP* [1998] 1 LNS 57 as authority in support of his contention. Although the case was in respect of s. 19 of the Women & Girls Protection Act, 1973 which Act has been repealed, however, by Act A1131, the Penal Code was amended to insert the same offence into the said Code.

[15] In the cited case, the judge was of the view that for an offence of living on the earnings of a prostitute, whether wholly or in part, there must be evidence that the earnings of the prostitute would end up in the pocket of the person charged with the offence.

[16] Knowing the difficulty of obtaining such direct evidence, the legislature has therefore enacted the presumption.

[17] In this case, given that the women talked about having their own 'tauke' it is essential for the learned Sessions Court judge to consider the implication of this evidence and to state whether she found direct evidence of the appellant pocketing the money himself or whether the presumption applied and if so, whether it has been rebutted.

[18] Mr. Jubilant has quoted in his submission in reply and I say appropriately so, a statement from the judgment of Edgar Joseph Jr FCJ in *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, 707 which is relevant on this issue on the presumption His Lordship said:

> Nowhere in his judgment did the judge direct his attention to the statutory presumptions as to possession in s. 37(d) and trafficking in s. 37(da) and as a result, he made no finding as to whether the defence had rebutted the same. This was a misdirection in law by way of non-direction. There may well be cases where, because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumption aforesaid, **but even in such a case**, the trial **court should specifically so find**. (emphasis added).

Thus, the learned Sessions Court judge's omission to refer and consider the presumption in this case is fatal.

[19] In this regard too, the other chief complaint of the appellant, which is the learned Sessions Court judge's failure to consider the exculpatory evidence of one of the prostitutes ie, PW5, is also material. For the record, PW5 in her evidence, particularly in cross-examination, gave an inconsistent evidence from that of the other women in that, *inter alia*, she said she did not know that the appellant was in charge of the prostitution activities in the apartment, or that the appellant locked the door after they serviced their customers. She was pointedly asked by the appellant's then counsel why the other women 'pointed their fingers at the appellant whereas she did not and she was asked whether she knew why they accused him'. Her answer was 'I do not know the reason why the other girls have pointed to Abang'. ('Abang' here refers to the accused.)

[20] These inconsistencies in the evidence of PW5, the effect of which to me are not minor but went to the crux of the prosecution's case, was never considered by the learned Sessions Court judge. She merely narrated her evidence (at p. 363 of the Appeal Record) but did not pick out the inconsistencies and consequently did not give any reasons why she preferred the evidence of PW1 - PW4 over that of PW5. In fact at one stage (at p. 364 para. 21 of the Appeal Record) she even grouped PW5's evidence together with that of PW1 to PW4 and made a sweeping statement to say that 'From the evidence adduced by the prosecution's witnesses, PW1, PW2, PW3, PW4 and PW5, it is clear that the accused assisted in the management of the said premises for prostitutions'. She found in the same paragraph of her

written judgment that the accused collected payment for the women's services, provided them with their tools of the trade, transported them to hotels where they serviced their clients and provided packed food to all five of them twice a day. All these were denied by PW5 in her evidence. More importantly, PW5 had also testified that she saw the appellant only twice at the apartment before the raid, once when he brought a piece of paper to see PW1 on 4 August 2008 and on the day of the raid itself. This is in contrast to the evidence of PW1 - PW4 that the appellant was at the apartment daily. It is to be noted that PW5 was never re-examined after giving her evidence in cross-examination.

[21] It is indeed an elementary rule of law that evidence must be weighed and not counted. Although PW5's was a lone voice compared to a chorus from PW1 to PW4, her evidence must be assessed in the light of theirs and if discounted, the learned Sessions Court judge must give her reasons for not believing her. Her failure to do so is, in my view, a misdirection which is fatal not just to the 1st charge but the 2nd charge as well.

[22] Additionally, she did not consider the fact that PW1 whom the appellant claimed had entered into the tenancy agreement with him was shown to have lied when the witness claimed to have never been to Sarawak before 10 July 2008 but the endorsement on her passport showed that she had been to Sarawak many times and her last trip was on 4 August 2008; not 10 July 2008. Mr. Jubilant had commented adversely the learned Sessions Court judge's acceptance of her evidence in the face of her lies and in my view her deliberate lie about her previous trips to Sarawak rendered her denial of entering into a tenancy agreement with the appellant suspicious as it probably masked an attempt to deflect any culpability on her part in respect of the offences committed in this case.

[23] I say this because when a witness has been shown to have demonstrably told a lie, her evidence must necessarily be viewed with caution and in accepting her evidence, the learned Sessions Court judge must give reasons why, despite her lie on oath, she can still be a witness of truth for the other matters stated by her in her evidence. In this regard, I would like to quote Greene M.R. in *Yuill v. Yuill* [1945] 1 All ER 183 at p. 188 which was quoted in the Federal Court's case of *Wong Thin Yit v. Mohamed Ali* [1971] 1 LNS 151. His Lordship said:

> If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.

[24] In this case, what is worst is the untrue answer was not even given in a collateral matter but in the main trial itself. Thus, having failed to direct her mind to these aspects of the witness' testimonies in court, I am of the view that the learned Sessions Court judge's convictions of the appellant cannot be sustained. In saying so, I am aware of the other evidence adduced at the trial which shows that the apartment raided was used as a brothel. The 'house rules' is clear evidence of one. What however is in doubt is the appellant's involvement in this vice activity in the manner as framed in these two charges and for the reasons which I gave earlier, I am of the view that he should be given the benefit of the doubt. Accordingly, I allow the appeal, quashed the convictions and set aside the sentence imposed by the learned Sessions Court judge. The collolary is that the cross-appeal by the prosecution is dismissed. In doing so, I am in no way belittling the valiant efforts made by Deputy Public Prosecutor, Musli Ab Hamid to defend her decision. My duty, as he correctly pointed out in his written reply is to consider that the convictions entered by the learned Sessions Court judge was right (see the Court of Appeal's case of *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389). That was precisely what I was doing because as Voltaire had said, it is better to risk saving a guilty man than to condemn an innocent one.

[25] In view of the misdirections of the judge (in the form of a non-directions) with respect to the presumption on living on the immoral earnings of a prostitute and her failure to deal specifically with the exculpatory evidence of PW5 and the credibility of PW1 in the face of her blatant lie, regrettably I have to interfere with what is otherwise a well-reasoned judgment.